Farmland Soy Processing Company *and* Hector Mendez. Case 26-CA-8112

December 13, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 9, 1982, a three-member panel of the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, in which it found that Respondent Farmland Soy Processing Company had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended, and ordered it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.[1] Thereafter, on August 28, 1982, Respondent filed a "Motion for Reconsideration En Banc," requesting that the full five-member Board reconsider the above Decision and Order, and stating various reasons for such reconsideration. On September 27, the General Counsel, by counsel, filed an opposition to Respondent's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered Respondent's motion, and the General Counsel's opposition, and has decided to amend its Decision and Order only to the extent indicated below. For the reasons stated herein, this amendment does not in any way alter the Board's Conclusions of Law, nor require that the Board amend its Order.

Respondent correctly points out that the record does not show that Mendez "reported 68 different kinds of safety hazards to be corrected" "in the last 16 days" of his employment, and we hereby amend our Decision to delete that finding. That specific finding is, however, in no way necessary to our finding that "Mendez was the most outspoken employee in raising safety issues . . . company records show that Mendez reported more safety hazards than any other operator." We hereby affirm that finding, and reject Respondent's contentions that it is unsupported by substantial record evidence. Thus, Respondent attempts to negate the record evidence by characterizing Mendez' complaints as relating to plant operations rather than safety. Needless to say, the two categories are not mutually exclusive; this is especially so given Respondent's production process, where malfunctioning machinery can cause sparks or flames which present a critical danger of explosion of dust or hexane. Furthermore, conditions relating to employee health are fairly encompassed within the meaning of workplace safety, and are matters of common employee concern. The record clearly demonstrates that Mendez was "the most outspoken employee" in raising such concerns, not only in terms of the number of complaints, but also in terms of his persistence, and that he did so not only in his daily logs—excerpts of which are in evidence—but orally as well. For all the foregoing reasons, Respondent's motion does not raise a substantial issue warranting reconsideration of our finding that Mendez was engaged in protected concerted activity within the meaning of Section 7 of the Act, and that he was the most outspoken employee in exercising his rights under that section of the Act.

Respondent contends that the record does not support our finding that "Young told [an] employee, about a month after Mendez' discharge, that Respondent had been looking for a way to discharge Mendez" (at 238). The relevant testimony is as follows:

> Q. What did Mr. Young say, the best you can recall?
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> A. He said they was looking for a while to get rid of him.
>
> Q. He said what?
>
> A. They was looking for something to get rid of him.

The Administrative Law Judge found (at 242) that "[t]here was a comment by . . . Young . . . to the effect that Respondent had been looking for a way to discharge Mendez." The Board considered that a fair characterization of the testimony, and adopted it.[3]

Respondent's motion raises no other issues not previously argued and fully considered by the Board.[4]

[1] 263 NLRB 237.

[2] Respondent's motion for reconsideration by the full five-member Board is hereby denied. See *Enterprise Industrial Piping Company*, 118 NLRB 1 (1957).

[3] Subsequently in our Decision, we placed this phrase in quotation marks for emphasis, not to indicate a quotation from the record.

[4] Respondent points to evidence of supposed misconduct or misjudgment by Mendez in performing his job, all of which was considered by the Board in reaching its Decision herein. We found that the "record contains little evidence critical of Mendez' work" and that Mendez had a "generally satisfactory work record . . . ." Thus, we found implicitly that Respondent's evidence did not demonstrate insubordination such as would cause Respondent to discharge Mendez, and that it had not explained Young's statement that Mendez had been "picking at" Respondent. Consequently, Respondent did not rebut the General Counsel's *prima*

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ORDER

It is hereby ordered that the Decision and Order in the above matter be amended to delete the words (at 238), "and that in the last 16 days of that period his daily logs reported 68 different kinds of safety hazards to be corrected," and to substitute a period for the comma after the word "operator."

IT IS FURTHER ORDERED that in all other respects Respondent's motion for reconsideration of the Decision and Order herein be, and it hereby is, denied.

MEMBER ZIMMERMAN, dissenting:

For the reasons stated in my original dissenting opinion in this case, 263 NLRB at 239 (1982), I would grant Respondent's motion for reconsideration, would adopt the Decision of the Administrative Law Judge, and would dismiss the complaint.

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facie case of unlawful discrimination. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980).

Member Jenkins does not rely on *Wright Line*, inasmuch as Repsondent's asserted reasons for the discharge were clearly pretextual instead of genuine, and *Wright Line* applies only to cases in which there is a genuine lawful reason as well as the unlawful reason for the discharge.